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No. 91-1847

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

MAYNARD B. MILLER,
Petitioner,

vs.

ROBERT BRIGGS and GRACE BRIGGS,
Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether notice to a bankruptcy trustee, without constructive notice to the world, of a deed of trust on bankruptcy estate realty, can defeat the bankruptcy trustee's bona fide purchaser rights under 11 U.S.C. § 544(a)(3). His rights under 11 U.S.C. §§ 544(a)(1) and/or (2)?

2. Whether the filing of a bankruptcy petition in bankruptcy court provides constructive notice to the world of the recitals in such petition.

3. If the same filing that perfects the bankruptcy trustee's title to debtor's realty also provides constructive notice of a security interest on that realty, does the trustee's title or the security interest have priority?

4. Whether the phrase "supposedly secured by assignments of Deeds of Trust," in describing a claim against a bankruptcy estate, provides notice of a deed of trust against specific bankruptcy estate realty.

QUESTIONS PRESENTED

(continued.)

5. Whether the de novo standard of review, rather than the clearly erroneous standard of review, should be used when reviewing a summary judgment. When reviewing a bankruptcy court determination of state law.

6. If the filing of a bankruptcy petition serves to perfect a security interest on bankruptcy estate realty, does such a filing constitute a "transfer" of that security interest for purposes of 11 U.S.C. § 547(b), the preference provision?

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OPINION BELOW

The opinion petitioner now asks this Court to review is reported as In Re Professional Investment Properties of America, Inc., 955 F. 2d 623 (9th Cir. 1992). A2-A26.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment in this matter on January 30, 1992, and denied petitioner's motion for rehearing on April 27, 1992. A1. Per 28 U.S.C. § 2101(c) and Rule of the Supreme Court 13.4 this petition for a writ of certiorari was required to be filed within ninety days after April 27, 1992, the date of entry of the Court of Appeals order denying rehearing. This petition being so timely filed this Court is vested with jurisdiction of this matter under 28 U.S.C. § 1254.

STATUTES

11 United States Code section 544(a):

(a) The trustee shall have, as of the

commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debtor at the time of he commencement of the case, and that obtains, at such time and with rspect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor

exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such a transfer at the time of the commencement of the case, whether or not such a purchaser exists.

11 United States Code section 547(b):

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the

petition;

or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider;

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 United States Code section 549(c):

(c) The trustee may not avoid under subsection (a) of this section a transfer of real property to a good faith purchaser without knowledge of the

commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to the interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected.

Revised Code of Washington sec. 4.28.325 :

In an action in a United States district court for any district in the state of Washington affecting the title

to real property in the state of Washington, the plaintiff, at the time of filing the complaint, or at any time afterwards, or a defendant, when he sets up an affirmative cause of action in his answer, or at any time afterward, if the same be intended to affect real property, may file with the auditor of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action and a description of the real property in that county affected thereby. From the time of the filing only shall the pendency of th action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were a party to the action. For the purpose of this section an action shall be deemed to be pending from the time of filing such notice: Provided, however, That such notice shall be of no avail unless it shall be

followed by the first publication of the summons, or by personal service thereof on a defendant within sixty days after such filing. And the court in which the said action was commenced may, in its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled of record, in whole or in part, by the county auditor of any county in whose office the same may have been filed or recorded, and such cancellation shall be made by an indorsement to that effect on the margin of the record.

Revised Code of Washington sec. 65.08.070:

A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real

property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.

STATEMENT OF THE CASE

Respondents and others filed an involuntary bankruptcy petition against Professional Investment Properties of America, Inc. on May 28, 1986. That petition included the following recital:

"The nature and amount of petitioners' claims are as follows:

a) ROBERT BRIGGS: Purchase of various Promissory Notes supposedly secured by assignments of Deeds of Trust with interest-only monthly payments which are now delinquent, some of said notes have matured and are unpaid, in the aggregate amount of approximately $137,500."

Nothing in the petition identified any parcel of real property; nothing in the petition referred to any specific deed of trust: the only reference to any

deed of trust was the language quoted above, i.e., that Robert Briggs held notes purchased from the debtor which notes were "supposedly secured by assignments of Deeds of Trust . . ."

Over one year later the respondents, the Briggs, filed an adversary proceeding alleging that they had loaned money to the debtor in October of 1985 in return for a promissory note and deed of trust on bankruptcy estate realty. Although that deed of trust was never recorded, or otherwise perfected, the Briggs asserted that the bankruptcy estate's title to said real property was subordinate to their deed of trust; that assertion was based on the aforesaid recital, "supposedly secured by assignments of Deeds of Trust," contained in the bankruptcy petition. The Briggs contention being that said recital provided timely constructive notice of the deed of trust.

The bankruptcy court, by summary judgment, and on the basis of the bankruptcy trustee's rights under 11 U.S.C. § 544(a), held that:

> Any constructive notice of plaintiffs' interest achieved by the filing of the original bankruptcy pleadings comes too late to secure their interest in a position prior to that acquired by the trustee. A46-A47

The district court, in reversing the bankruptcy court, stated:

> Under Washington law, this language is sufficient to put an ordinary prudent person on inquiry of the Briggs' interest in the real property in the form of a Deed of Trust. Certainly, the language creates a circumstance which raises a duty to require further inquiry by the trustee to determine if there is a Deed of Trust. A reasonably diligent inquiry would have disclosed the unrecorded deeds of trust. A40-A41

The bankruptcy trustee appealed the decision of the district court, and during the pendency of that appeal the trustee, as representative of the bankruptcy estate and pursuant to bankruptcy court order (A28-A30), sold to Maynard B. Miller the bankruptcy estate's title to the fund generated from a bankruptcy sale of the realty to which the deed of trust pertains; those funds are being held be the bankruptcy court pending the instant proceedings. By Circuit Court of Appeals order (A27) Maynard B. Miller was substituted as appellant for the bankruptcy trustee and for the bankruptcy estate. Your petitioner, Maynard B. Miller, as appellant, and Robert Briggs and Grace Briggs, as appellees, are the only parties to the proceedings in the Ninth Circuit below.

The Ninth Circuit, adopting the "findings" of the bankruptcy court, and

the reasoning of the district court, affirmed the district court and denied rehearing.

The bankruptcy court, the court of first instance below, had federal jurisdiction of this bankruptcy proceeding per 28 U.S.C. § 157 (a) & (b). The U.S. District Court had jurisdiction of the appeal from the bankruptcy court under 28 U.S.C. § 158 (a). The United States Court of Appeals had jurisdiction of the appeal from the district court per 28 U.S.C. § 158 (d).

ARGUMENT

QUESTIONS PRESENTED Nos. 1 and 2

The decision of the United States Court of Appeals for the Ninth Circuit in this matter is in square and direct conflict with the only United States Court of Appeals decision with which it is on all fours regarding questions presented one and two, the two most certworthy questions presented by this

petition. That decision, Cooper Grocery Co. v. Park, 218 Fed. 42 (5th Cir. 1914), has been followed, until the instant case, by every federal court that has issued one or more reported decisions which announce a holding regarding said questions presented: In Re Lindsey, 131 F. Supp. 11,13 (D.C. N.J. 1955); In Re Chappell, 77 F. Supp. 573,576 (D.C. Ore. 1948); Matter of Youngs Cornell Utilities, Inc., 20 F. Supp. 381,382 (D.C. N.Y. 1937); In Re Cobb, 14 F. Supp. 465,467 (D.C. Mich. 1936); Matter of Holley, 25 F. 2d 979, 980-981 (D.C. Iowa 1928); Matter of Douglas Lumber Co., 2 F. 2d 985, 987-988 (D.C. Wyo. 1924); and In Re Sayer Village Manor, Inc., 120 F. Supp. 215,216 (D.C. N.J. 1954).

In Cooper Grocery Co., supra, the Texas race-notice statute involved in that deed of trust case was, for all intents and purposes, identical to

Washington's RCW 65.08.070, supra p. 7. Cooper Grocery Co. was followed by the highest court of the State of Minnesota in Neils v. Bohlsen, 181 Minn. 25, 231 N.W. 248,249 (1930).

The most respected secondary authority on bankruptcy law, Collier, at 4B Collier on Bankruptcy ¶ 70.53 at pp. 638-640 (14th ed. supp. 1988) cites with approval the cases just cited herein for the proposition that notice to a bankruptcy trustee in his capacity as trustee will not serve to negate his rights under what is now codified as 11 U.S.C. §§ 544(a)(1) & (2). Collier, at p. 640, quoting from Matter of Youngs Cornell Utilities, Inc., supra, notes that it would be at least unreasonable to have the wording of a bankruptcy filing determine the priorities regarding bankruptcy estate property.

The Ninth Circuit's opinion below focuses on an irrelevant issue, which

leads to an erroneous conclusion. That opinion, at A2-A3, states: "In this bankruptcy case we are asked to decide under Washington law whether the contents of the Briggs' involuntary petition which forced the debtor into bankruptcy put the trustee on sufficient inquiry notice of the Briggs' interest under unrecorded instruments. If so, he may not invoke the avoidance powers provided by 11 U.S.C. § 544." (Emphasis added.) It was the Ninth Circuit that chose to make notice to the trustee pivotal to its decision, and so it focused on that issue throughout its opinion; e.g., A13, A16 and A20. The Ninth Circuit not only selected and focused on a legally irrelevant issue, it arrived at an erroneous conclusion regarding that issue.

The relevant issue is not whether the petition put the trustee on notice of the deed of trust, but whether the

filing of the petition served to give **to the world** constructive notice of the deed of trust so as to timely **perfect** tht deed of trust. The answer to that question, the question actually presented, is plainly a resounding "No". One need not go beyond the language of 11 U.S.C. 544(a) for that answer. Clearly the filing of the bankruptcy petition did not prevent the debtor from transferring title to the realty to bona fide purchase for value free of the deed of trust, so, per 11 U.S.C. §544(a)(3), the trustee received title free of the unperfected deed of trust, regardless of what notice thereof he may have been given. Not only does the plain language of the "governing" statutes so provide, but caselaw so holds. In Re Walker, 67 B.R. 811, 813 (Bkrtcy. C.D. Cal. 1986). The opinion of the Ninth Circuit below is discordant even with the law announced by this Court in United States

v. Speers, 382 U.S. 266, 275, 15 L. Ed. 2d 314, 320, 86 S. Ct. 411,416 (1965)(Cf. Corn Exchange Nat. Bank & Trust Co. v. Klauder, 318 U.S. 434, 87 L. Ed. 884, 63 S. Ct. 679 (1943)), as well as with all relevant Ninth Circuit decisions: Pacific Bank v. Coats, 205 F. 618, 624 (9th Cir. 1913); In Re Heide, 915 F. 2d 531 (9th Cir. 1990); In Re Staff Mortg. & Inv. Corp., 625 F. 2d 281 (9th Cir. 1980); and Martin v. Crocker-Citizens Nat. Bank, 349 F. 2d 580 (9th Cir. 1965). The law of the State of Washington also holds that if a security interest on bankruptcy estate property is not perfected before the bankruptcy petition is filed the bankruptcy trustee takes free of such security interest. First Guar. Bank v. Western Cross A. & M. Co., 139 Wash. 615, 247 P. 1027 (1926), and Dorsey v. Brunswick Corp., 69 Wn. 2d 511, 418 P. 2d 732 (1966). Decisions from each of

the other circuits also hold that unless a security interest on bankruptcy estate property is perfected before the bankruptcy petition is filed the trustee takes free of such security interest. In Re Maryville Sav. & Loan Corp., 760 F. 2d 119, 121 (6th Cir. 1985) and In Re Casbeer, 793 F. 2d 1436,1440 (5th Cir. 1986). Not only do the respondents admit that their deed of trust was not ever perfected (page 19 of Brief of Appellees filed with the Ninth Circuit.), but it plainly was not "perfected". In Re Freedlander, 107 B.R. 88,90 (Bkrptcy. E.D. Va. 1989). Only if the whole world is timely placed on constructive notice of a security interest on bankruptcy estate property does the bankruptcy trustee take subject to such security interest. In Re Weisman, 131 B.R. 148,153 (N.D. Cal. 1991); In Re Seaway Exp. Corp., 912 F. 2d 1125, 1128-1129 (9th Cir. 1990).

Although the basic focus should be on whether a security interest on estate property is perfected before the bankruptcy petition is filed, oftentimes constructive notice to the world of a security interest is required in order to perfect such an interest; sometimes constructive notice to the world can be provided by open and continuous possession, e.g., In Re Gulino, 779 F. 2d 546, 551 (9th Cir. 1985), and McCannon v. Marston, infra.

The proposition that a reference to a security interest in the initial bankruptcy court filing serves to give such notice of that interest to the trustee that he takes subject to such interest had been asserted, albeit unsuccessfully, with some frequency, but for nearly forty years now In Re Lindsey, supra, has stood at the end of an unbroken line of reported opinions

refuting said assertion. Now comes the Ninth Circuit and here accepts that thoroughly discredited, long dormant, and wholly unsound notice-to-trustee assertion so as to defeat the trustee's rights under 11 U.S.C. § 544(a).

Congress has repeatedly, over the years, statutorily strengthened and confirmed the law announced in Cooper Grocery Co. v. Park, supra. E.g., in 1978 Congress added the bona fide purchaser status to the rights of the trustee by the enactment of 11 U.S.C. § 544(a)(3); and in 1984 Congress confirmed the Cooper Grocery Co. rule by amending 11 U.S.C. §549 (c) to provide that the filing of a bankruptcy petition in bankruptcy court does not provide constructive notice, even of the bankruptcy estate's title to debtor's realty, even where the realty is in the same county as the bankruptcy court. The law has for so many years so clearly

provided that recitals in bankruptcy court filings do not serve to perfect security interests, the Ninth Circuit's decision below is at least astounding.

While the fact that the opinion of the Ninth Circuit is in direct conflict with other reported opinions may not alone cause this Court to grant certiorari, the reasoning supporting those other opinions should cause this Court to do so; as Collier, supra, noted, the rationales of those opinions "command respect". Further, Miller, in reliance on 11 U.S.C. §§ 544(a), 547(b) & 549(c), RCW 4.28.325 and RCW 65.08.070, Cooper Grocery Co., supra, Collier, supra, and the rest of the law, purchased the bankruptcy estate's lawful right to the fund in contention; the judiciary should be most reluctant to change a settled rule of property so as to frustrate the reasonable expectations of those who make business

decisions based on such rule.

It was clear beyond any reasonable doubt that the debtor, despite the filing of the bankruptcy petition, could have conveyed to a BFP free of any interest arising from the Briggs' deed of trust. For a definition of "bona fide purchaser," as the phrase is used in 11 U.S.C. § 544(a)(3), see In Re Gurs, 27 B.R. 163,165 (9th Cir. BAP 1983). 11 U.S.C. § 549(c) plainly states that the bankruptcy filing is not such constructive notice to the world as to prevent the debtor from conveying clear title to a BFP. If the trustee receives, as § 544(a)(3) says he shall receive, as good a title as the debtor could have conveyed to an ideal BFP, the Ninth Circuit's holding that the trustee's title is subordinate to the Briggs' deed of trust is at least directly contrary to the plain words of 11 U.S.C. § 544 (a)(3).

The Ninth Circuit relies on **inquiry notice.** The leading case on inquiry notice as it relates to the bankruptcy trustee's BFP rights, is In Re Ryan, 851 F. 2d 502, 505 & 511 (1st Cir. 1988). In Re Ryan holds that only if the inquiry notice is derived from constructive notice to the world will such notice affect the trustee's title. In this case, just as in In Re Ryan, there was no constructive notice to the world to trigger any inquiry notice which would have prevented the debtor from conveying to an ideal BFP free of the security interest. If an ideal BFP could have received free of the security interest so must the trustee have received such a title per 11 U.S.C. § 544(a)(3), and In Re Ryan so holds.

The Ninth Circuit's discussion of whether inquiry notice is a species of actual notice or constructive notice is wholly irrelevant; neither type of

notice was here ever present so as to give to the Briggs' deed of trust priority over the trustee's title; i.e., there was no timely constructive notice to the world of the deed of trust. 11 U.S.C. § 549(c)'s notice provision was amended in 1984 so as to leave no doubt that bankruptcy court filings do not provide constructive notice even regarding realty located in the same county as the bankruptcy court. In Re Duffy-Irvine Associates, 39 B.R. 525, 530 (Bkrtcy. E.D. Pa. 1984).

There is no basis upon which to hold that the world was given constructive notice of the bankruptcy court filing here so as to trigger inquiry notice to those who would otherwise qualify as ideal BFPs; therefore such filing cannot, according to law, serve to afford priority to the deed of trust over the trustee's BFP rights under 11 U.S.C. § 544(a)(3).

RCW 4.28.325 provides that the only way to give constructive notice to the world of actions in the U.S. District Court, which includes the bankruptcy court per In Re Goldblatt Bros., Inc., 61 B.R. 459, 466 n. 4 (Bkrptcy. N.D. Ill. 1986), is to file a **lis pendens** with the county where the realty to be affected is situated; the Ninth Circuit's opinion, at A25, that RCW 4.28.325 "does not suggest that this(a lis pendens) is the exclusive method of providing constructive or inquiry notice(of bankruptcy court actions)"(Parentheticals added.), is perhaps literally correct; RCW 4.28.235 does not "suggest" such, it clearly declares such. The Ninth Circuit's logic is flawed in accepting, A25-26, as logical the contention that the Briggs could not have used a lis pendens to give constructive notice. In Re Seaway Exp. Corp., supra pp. 1128-1129. Again,

notice of any type to the bankruptcy trustee per se is wholly inapposite; regardless of what notice he may receive he still takes as good a title as the debtor could have conveyed to any ideal BFP, not merely what the debtor owned under local law. In Re Graham, 110 B.R. 408, 411 & 413 (S.D. Ind. 1990).

Washington statutory and caselaw fully support the result reached below by the bankruptcy court. But even if Washington caselaw held, by flying in the face of "applicable" state statutes, that bankruptcy court filings serve as constructive notice to the world, such state law would be **preempted** by 11 U.S.C. §§ 544(a)(3) & 549(c) where the plain purpose of said federal bankruptcy statutes is, inter alia, to have the bankruptcy trustee take the debtor's property free of unrecorded security interests on bankruptcy estate realty. International Shoe Co. v. Pinkus, 278

U.S. 261,265, 73 L. Ed. 318,320-321, 49 S. Ct. 108,110(1929).

McCannon v. Marston, 679 F. 2d 13 (3rd Cir. 1982), heavily relied on by the Ninth Circuit below, recognized that if the bankruptcy debtor could have conveyed title, at the time the bankruptcy petition was filed, to a BFP free of a given interest in estate realty, then the bankruptcy trustee received such a clear title by the filing of that petition. McCannon held that because the claimant to the realty gave constructive notice to the world of her claim by open and continuous possession a BFP could not have taken free of her claim, and therefore neither did the bankruptcy trustee; the reasoning of McCannon fully supports the result reached by the bankruptcy court below, and is in conflict with the decison of the Ninth Circuit below; here the debtor, per McCannon, could

have conveyed clear title to a BFP despite the filing of the petition.

The opinion of the Ninth Circuit would be obviously untenable if it simply held that a bankruptcy court filing of a bankruptcy petition provides constructive notice to the world of recitals in that petition; instead of so holding, it holds that such a filing places the bankruptcy trustee on inquiry notice, and that such limited notice is sufficient to subordinate the estate's title. That holding is no less untenable, but its invalidity is less obvious. Again, notice to the trustee is irrelevant under 11 U.S.C. § 544(a), and any inquiry notice to an ideal BFP must be triggered by, and be the product of, constructive notice to the world of something. In Re Ryan, supra. If the opinion of the Ninth Circuit stands it will at least be a hazard to legal research nationwide, and will, at least

in the Ninth Circuit states, subvert purpose of 11 U.S.C. § 544(a) in thousands of bankruptcy cases.

The opinion below, at A20, states: "There is no practical reason why a trustee should not be on inquiry notice by the very petition that created his position. A trustee who had not yet been appointed can hardly argue that he has been prejudiced by being charged with notice by the petition." These two sentences reveal that some basic bankruptcy law tenets were overlooked. Congress has clearly found good reason for granting to the trustee BFP rights, and although those reasons have many times eluded judges, the judicial branch should not usurp the legislative province. Some reported opinions have expressed the sound **policy** reasons for granting to bankruptcy estates BFP rights and lien avoidance powers: E.g., In Re Grest Western Plains Ranch Co.,

Inc., 38 B.R. 899,903-905 (Bkrtcy. C.D. Cal. 1984), and In Re Loretto Winery Ltd., 898 F. 2d 715,725-727 (9th Cir. 1990).

The fact that the trustee in his own right would not be prejudiced by being charged with notice, so as to defeat "his" BFP rights, is wholly irrelevant; those rights are intended to benefit the creditors he represents as their alter ego. Further, the fact that neither he, nor the creditors he represents, are prejudiced by reason of no timely constructive notice to the world having been given is of no legal significance. In Re Persig Farms, Inc., 46 B.R. 237,243 (D.C. Minn. 1985). The sentences quoted on the foregoing page indicate the Ninth Circuit's failure to appreciate the fact that the trustee is granted ideal creditor and ideal BFP rights, rather than merely stepping into the debtor's shoes. Said quote also

indicates a lack of appreciation that the trustee's title vests in him as of the time the petition is filed, and his title is deemed fully perfected as of that time. In Re Pacific Exp., Inc., 780 F. 2d 1482,1486 (9th Cir. 1986). Even if "the filing put the trustee, once appointed, on inquiry notice." (A20)(Emphasis added.), such notice would long follow the perfection of the trustee's title, and be plainly untimely to give the security interest priority over the estate's title.

There is nothing peculiar to **Washington law** that renders it incompatible with 11 U.S.C. § 544(a)'s purpose of affording to the bankruptcy trustee ideal lien creditor and BFP rights; in fact RCW 4.28.325/RCW 65.08.070 harmonize and dovetail nicely with 11 U.S.C. §§ 544(a) & 549(c). The trustee had no duty to inquire about an unperfected security interest on estate

property because such interest was disclosed in the bankruptcy petition; such disclosure would, according to law, not diminish or otherwise affect the estate's rights; if, however, the Ninth Circuit's opinion below stands, recitals in bankruptcy filings, which allude to unperfected security interests, will radically alter present priorities regarding estate property; in fact the initial filing in most bankruptcy cases discloses security interests on estate property, be those interests perfected or unperfected.

QUESTION PRESENTED No. 3

Neither the district court nor the Ninth Circuit even attempted to explain how any notice from the bankruptcy petition could be imparted even to the trustee prior to the perfection of his title "as of the commencement of the case." An eloquent and persuasive statement that such simultaneous "notice"

to, and vesting of title in, the trustee, is no notice at all, is found in Matter of Youngs Cornell Utilities, Inc., supra, at page 382; see also In Re Pacific Exp., Inc., supra. The basis of the trial court's decision was untimeliness of the "notice" of the deed of trust in relation to the perfection of the estate's title; this Court should address that sound grounds relied on by the bankruptcy court, the trial court.

QUESTION PRESENTED No. 4

Even if the "notice" of the deed of trust, which was contained in the bankruptcy petition, had been recorded early on where deeds are recorded to give constructive notice to the world, still such recordation would not have given constructive notice of the Briggs' deed of trust. **The recital** in the bankruptcy petition relied on for notice, "supposedly secured by assignments of Deeds of Trust" (Emphasis

added.), not only fails to provide the description of the realty required by RCW 4.28.325, it informs any reader of the petition that the deed of trust alluded to therein is not against bankruptcy estate realty; the debtor would only assign deeds of trust as to which it is the beneficiary, the mortgagee; not regarding which it is the fee owner. The said recital plainly informs a reader thereof that the debtor is not the equity owner of the realty. It is not even a vague hint of a security interest against bankruptcy estate realty, and so would have been wholly inefective to put the world on constructive notice of a deed of trust on realty belonging to the debtor, even if the recital was recorded where the law provides that deeds of trust need to be recorded. Congregational Church Bldg. Soc'y v. Scandinavian Free Church of Tacoma, 24 Wash. 433, 435, 64 P. 750,

750-751 (1901), and In Re Chenich, 100 B.R. 512, 514-515 (9th Cir. BAP 1987). The Ninth Circuit did not even address the meaning of the recital relied on by the Briggs. That recital's identification of the grantor of the deed of trust as other than the bankrupt provides yet another sound basis upon which to sustain the bankruptcy court.

QUESTION PRESENTED No. 5

The Ninth Circuit holds at A11 that it will review the "findings" below on the basis of a clearly erroneous **standard of review**; then goes on at A14-A15, and at A23, to base its decision on various "findings of fact"; that incorrect standard of review, instead of the correct de novo standard, affords undue deference to certain "findings" signed by the bankruptcy judge, but which were presented to him by respondents. A47. A clearly erroneous standard of review is palpably improper

where, as here, the trial court decision was a summary judgment. In Re Kirkland, 915 F. 2d 1236,1238 (9th Cir. 1990): Not only should a summary judgment be reviewed de novo, but so should a determination of state law. Salve Regina College v. Russell, 499 U.S.____, 113 L. Ed. 2d 190,198, 111 S. Ct. 1217,1221(1991). Conclusions of law are reviewed de novo even though the trial court labels them "Findings of Fact". In Re Bubble Up Delaware, Inc., 684 F. 2d 1259,1262 (9th Cir. 1982). Even actual findings of fact, when made in summary judgment proceedings, are reviewed de novo. In Re United Energy Corp., 102 B.R. 757,760 (9th Cir. BAP 1989); and such findings should be scrutinized when drafted, as here, by the party relying on them on appeal. In Re T.H. Richards Processing Co., 910 F. 2d 639, n. 2 at p. 643 (9th Cir. 1990). A bankruptcy trustee's lien avoidance

power is a question of law, and as such is reviewed de novo. In Re Loretto Winery, supra at 718. In sum bankruptcy courts' summary judgments are reviewed de novo in toto. In Re Nash, 765 F. 2d 1410,1412 (9th Cir. 1985). Although the Ninth Circuit's use of an incorrect standard of review would not in itself support a grant of certiorari, it points out how far the Ninth Circuit reached for support for its conclusions regarding certworthy questions one and two.

QUESTION PRESENTED No. 6

If the filing of the bankruptcy petition served to perfect, i.e., transfer, a security interest, such perfection of that interest would be avoidable as a **preferential transfer** under 11 U.S.C. § 547(b). In Re Gulino, supra at 551-552; In Re Chenich, supra at 513 & 515; In Re Meritt, 7 B.R. 876,878 (Bkrtcy. W.D. Mo. 1980); and

U.S. Fidelity & Guaranty Co. v. Ryan, 124 Wash. 329,341-345, 214 P. 433,437-438 (1928). Therefore, even if this Court sustains the holding that the vague hint, at best, in the petition perfected the deed of trust prior to the perfection of the bankruptcy estate's title, this Court should, in its next breath, affirm the bankruptcy court, the trial court, on the basis of voidable preference. Helvering v. Gowran, 302 U.S. 238,245, 82 L. Ed. 224,230, 58 S. Ct. 154,157(1937); and In Re Gulino, supra at p. 552. All the elements of a preference, if perfection is found here, are contained in the record; e.g., the Briggs loaned money to the debtor in October of 1985, and "perfected," i.e., received a transfer of, the security interest in May of 1986 when the bankruptcy petition was filed. The Briggs below took the untenable position that because they did not perfect their

deed of trust by recording it, it has priority over the trustee's title; i.e., giving notice via the petition preserved their security interest, but recording it, at the time the petition was filed, would have destroyed it. The Ninth Circuit did not even address the preference grounds, upon which grounds the bankruptcy court should be sustained, if we accept the inquiry-notice-to-trustee theory relied on by the Ninth Circuit.

PETITIONER'S STANDING TO RELY ON §544(a)

Your petitioner, before concluding, will comment on his standing, as purchaser from the bankruptcy estate, to rely on 11 U.S.C. § 544(a). The respondents in their brief to the Court of Appeals asserted that Miller could not rely on said provision. Miller's reply so refuted that challenge to his standing that respondents conceded the point in oral argument before the Ninth

Circuit.

In Re Seaway Exp. Corp., supra at 1128, makes clear that 11 U.S.C. § 544(a) grants both rights and powers to the trustee, and while the powers might arguably be exercisable only by the trustee, he can certainly assign his BFP rights under the statute. Accord Belisle v. Plunkett, 877 F. 2d 512, 515-16 (7th Cir. 1989). Further, the trustee had already exercised his powers, and obtained a judgment in his favor from the bankruptcy court, before the estate transferred its interest to Miller. Finally, the leading case of In Re Dennis Mitchell Industries, Inc., 419 F. 2d 349,359-360 (3rd Cir. 1969) squarely upholds Miller's right to rely on 11 U.S.C. § 544(a).

CONCLUSION

If this Court denies this petition the decision of the Ninth Circuit will change the law by affording to

unperfected security interests priority over bankruptcy estate titles; if this Court does not grant certiorari 11 U.S.C. § 544(a) will remain judicially eviscerated.

There is nothing unique about the law of the State of Washington, nor the facts of this case, that will restrict the shocking impact the opinion below will have on bankruptcy estate administration. The said opinion is so out of line with other reported opinions, and the plain words governing statutes, it will not only radically change the law in the Ninth Circuit, but outside the Ninth Circuit it will at least wreak havoc as a hazard to legal research.

A bankruptcy trustee acts as the representative of the bankrupt's creditors, and the purpose of bankruptcy law is to effect a ratable distribution of the debtor's assets among those

creditors. The opinion of the Ninth Circuit defeats that purpose by at least exalting form over substance; i.e., notice by recording where security interests should be recorded on the day the petition is filed destroys the security interest, but making reference thereto in a bankruptcy court filing preserves the security interest.

The rules fixing creditors' rights regarding bankruptcy estates are applied nationally, and there is an overriding need, in their application, for national uniformity. Questions presented one and two should be resolved by this Court.

Respectfully submitted,

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